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In The

Supreme Court of the United States

October Term, 1973

No. 73 590

PAUL VARIO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JEROME LEWIS
Counsel for Petitioner
250 Broadway
New York, New York 10007
(212) 966-6636

H. ELLIOT WALES
On the Petition

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In The

Supreme Court of the United States

October Term 1973

PAUL VARIO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Paul Vario petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered September 12, 1973 (Docket No. 73-1592).

The judgment affirmed the conviction for violating the Internal Revenue Code (26 U.S.C. Section 7206) as to an omission of a material statement in his 1965 and 1966 personal income tax returns (form 1040), and for conspiracy to so violate, after a jury trial in the Eastern District of New York (No. 72 CR 424).

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is set forth as Appendix A.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Court of Appeals is authorized by 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

This petition relates to the fifth amendment right to due process.

ISSUES INVOLVED

1. Did the Court of Appeals err, contrary to the decision of this Court in *Holden v. United States*, 150 U.S. 91, 92 (1893), and contrary to accepted notions of due process and proper judicial administration, when it permitted a violation of the exclusionary order against yet to be called witnesses from sitting in the courtroom while other witnesses are testifying?

2. Did the Court of Appeals err, contrary to *Holden v. United States, supra*, when it affirmed the decision of the district court, refusing to strike the testimony of a prosecution witness who had previously sat in the courtroom while another government witness had testified, in violation of the exclusion order of the district court?

3. Did the Court of Appeals err, contrary to the due process requirement, when it affirmed the decision of the district court allowing, in this income tax case, evidence of police protection?

PRELIMINARY STATEMENT

Petitioner was convicted on count two of omitting to make a material statement on his 1965 personal income tax return (form 1040) as to the nature of his income—namely, that it was derived from a gambling or policy operation. On count three Vario was convicted of a like offense as to his 1966 personal income tax return. On count one petitioner was convicted of conspiracy to so violate the Internal Revenue Code. Neither co-conspirator went to trial with him; one (De Pasquale) died earlier; the other (Younger) pleaded guilty.

For the tax years 1965 and 1966 Vario filed personal income tax returns showing an income of a salary from the Fountainblue Florists. The government did *not* attempt to show that Vario received specific sums of money, or that he made certain bank deposits, or that he spent sums of money in excess of his reported income. Nor was this a net worth case. The government proceeded solely on the theory that Vario was the "behind the scenes man" in an active policy business, and that he failed to state this fact on his income tax returns in the space calling for his occupation. In addition the prosecution claimed he failed to include in his gross income sums of money which he must have received from his role in this endeavor.

Several undercover agents and former policy writers testified to personal dealings with the two co-cospirators—Younger and De Pasquale. None testified to any dealings with Vario. In its opinion the Court of Appeals noted that while the evidence passed the test of sufficiency, it was thin—"the contacts between these witnesses and Vario were not as extensive as those between the witnesses and Vario's co-conspirators". The prosecution sought to establish Vario's connection to the others by evidence that he was seen in their company, by hearsay statements attributed to the others about their relationship to Vario, and by testimony of a local detective (Fortuna) that while he was investigating a burglary at

Vario's home, Vario had told him he had kept $15,000 cash in the house and that he saw a metal box with cash. In rebuttal, to contradict Vario's own testimony denying his supposed conversation with Detective Fortuna, and the existence of the cash box, Detective Donohue testified that on the same date and place he was with Detective Fortuna, that he saw the cash box, and Vario had told him he had just spent $6,000 for landscaping.

In violation of the exclusionary order prohibiting yet to be called witnesses from sitting in the courtroom while other witnesses are testifying, Detective Donohue sat in the courtroom while his partner Detective Fortuna was testifying. Subsequently Donohue testified in like fashion to Fortuna—he saw the cash box in Vario's home. In upholding the district court decision denying the defense motion to strike Donohue's testimony, the Court of Appeals wrote:

> "Appellant next argues that the district court erred in refusing to strike the testimony of rebuttal witness Detective Robert Donohue. As part of the government's case-in-chief, Detective Frank Fortuna testified that in August, 1965, he had investigated a burglary at Vario's home. While there Fortuna stated that Vario had shown him a small metal box containing three stacks of money which Vario stated amounted to $15,000. During his testimony Vario denied that he had ever had $15,000 in his house, that he had ever kept money in a metal box, or that he had told Fortuna that there was $15,000 in the box. Vario also denied showing any other police officer a metal box containing currency at the time of that burglary. On rebuttal Robert Donohue was called to testify that he, too, had investigated the August, 1965 burglary of Vario's home and had seen a metal box containing three stacks of currency.

Vario himself then pointed out to his attorney that, despite the existence of an order excluding witnesses from the courtroom, Donohue had been in court on the previous day during Fortuna's testimony. Vario's attorney moved to strike Donohue's testimony, which motion was denied.

When called upon by the court for an explanation of this violation of the court's exclusion order, the government stated that Donohue had attended the trial previously only because his partner, Detective Fortuna, was expected to testify. The government further stated that at the time of Fortuna's testimony, it was not expected that Donohue would testify, and that Donohue's testimony was necessitated only by Vario's denial.

Violation of an order excluding witnesses does not automatically bar a witness from testifying. Holden v. United States, 150 U.S. 91, 92 (1893). In this case, the trial court was convinced that there was no intentional violation of his order. (Transcript at 609). The court ruled that the testimony should not be stricken only after specifically requesting of Vario's attorney a showing of the prejudice Vario had suffered as a result of this violation of the exclusion order. No such showing was made, nor could there have been such a showing.

The fact that Donohue had been in court to hear Fortuna's testimony was called to the jury's attention. This case is unlike United States v. Nazzaro, 472 F. 2d 302 (2d Cir. 1973) in which this Court found error where the district court failed to exclude an agent whose 'credibility was a

> crucial element in the government's case. . . .' (472 F. 2d at 313 n. 12). While Donohue's testimony was helpful to the government in attacking Vario's credibility and in establishing that Vario had gross income which he was concealing it cannot be said that either Donohue's testimony or his credibility was 'crucial' to the government's case. The trial court did not err in refusing to strike Donohue's testimony."

Also at the trial, over defense objection, the district court permitted the prosecution to introduce evidence of police protection. An agent had testified that for some period of time he regularly observed police vehicles trailing Vario's vehicle. In sustaining the district court, the Court of Appeals stated:

> "Appellant's final assignment of error is that the district court erred in permitting the government to introduce evidence that tended to show that Vario was receiving police protection. This evidence consisted of the testimony of a Special Agent of the Internal Revenue Service who had conducted surveillance of certain activities in which Vario was involved. The Agent stated that during 1965 he had observed Vario and co-conspirator De Pasquale standing outside a house looking up and down the street. Shortly thereafter, a police car drove slowly by. Vario and De Pasquale entered a vehicle and drove to an intersection where the same police car came up behind the vehicle in which Vario and De Pasquale were riding. The cars then drove off together. Taken as a whole, it was for the jury to decide whether the Agent's testimony would support an inference that Vario and De Pasquale were receiving police protection.

Vario's attorney objected to the admission of this testimony at trial and here argues that this evidence had no probative value but served only to indicate that Vario 'was a bad man, deserving of conviction on whatever charge the government sought to bring against him. (citation omitted) It really added little as to what gross income (came) into his hands. Nor did it evidence that he was in the policy business as opposed to any other illicit endeavor.' (Appellant's Brief at 16-17).

The rule in this Circuit regarding the introduction of another crime (here, by inference, bribing policemen) in that such evidence is admissible only if it is substantially relevant to some other purpose than to prove criminal character. United States v. Bozza, 365 F. 2d 206, 213 (2d Cir. 1966); United States v. Keilly, 445 F. 2d 1285, 1288 (2d Cir. 1971), cert. denied, 406 U.S. 962 (1972).

In this case evidence tending to show inferentially that Vario had paid for police protection was properly admissible to show (1) that Vario's activities generated sufficient income to enable him to pay for such protection, which, another agent testified, would have cost between $900 and $1,000 per month; (2) that Vario had a source of income which he was concealing; and (3) that there was a relationship between Vario and his alleged co-conspirator De Pasquale. United States v. Bonanno, 467 F. 2d 14, 17 (9th Cir. 1972), cert. denied, 41 U.S. L.W. 3409 (U.S. Jan. 22, 1973); Hanger v. United States, 398 F. 2d 91, 102 (8th Cir. 1968), cert. denied, 393 U.S. 1119, reh. denied, 395 U.S. 971 (1969). The admission of this type of evidence must of necessity be dependent to a great extent upon the trial judge's discretion. Such evidence would naturally be prejudicial to a

defendant. On the other hand, if it is related in a reasonable way to the particular crime charged, the trial judge must weigh the effect of possible prejudice against relevancy. We cannot say that the trial judge here misread the scales. See 1 Wigmore, Evidence Section 29a (3rd ed. 1940)."

REASONS FOR GRANTING THE WRIT

1. The opinion of the Court of Appeals permitting a violation of the exclusionary rule against yet to be called witnesses is contrary to the decision of this Court in *Holden v.. United States*, 150 U.S. 91, 92 (1893), and is contrary to accepted notions of proper judicial administration and appropriate standards of due process.

The exclusion of prospective witnesses serves an important function of protecting the integrity of testimony. Testimony which is tailored to fit prior evidence or the narrations of earlier witnesses serves little purpose in assisting the jury to determine what really happened. The exclusionary rule serves a prophylactic purpose—it tends to keep witnesses honest. It minimizes the opportunity for fabricated testimony.

The exclusionary rule is routinely requested and applied. Its validity is widely accepted. As such it has produced few reported opinions. The Court has not discussed the subject in years. As such it is time that Courts are reminded once again of the importance of the rule. Certainly the rule can have little effect if the Courts are allowed to shut their eyes to violations.

In our situation Detective Donohue's testimony was important. He was called in rebuttal by the prosecution after Vario had testified in his own behalf, and had disputed the testimony of Detective Fortuna. He corroborated Fortuna's testimony that he too saw a metal

box with cash in Vario's home. Little wonder he corroborated Fortuna—he sat in the courtroom while Fortuna testified.

Nor did the prosecution even advise the district court that Donohue was present in the courtroom, in violation of the exclusionary order of the court. Certainly candor and fairness required the prosecution to so inform the district court, and ask for judicial permission to call him as a witness. Instead the government acted *ex parte*, and the district court first learned of the matter only when it was asked on cross-examination. Then the defense moved to strike the testimony of the witness, which motion was denied. The Court of Appeals sustained the decision of the district court on the ground that the testimony was not "crucial", cf. *United States v. Nazzaro*, 472 F. 2d 302 (CA-2, 1972), and the violation was not intentional. The Court of Appeals in its opinion noted the evidence against Vario was thin (though sufficient). As such it is difficult to pass of Donohue's testimony of direct contact with Vario as not "crucial". Furthermore as the prosecution never apprised the district court of Donohue's sitting in the courtroom while Fortuna testified, and the matter came to light only when Donohue conceded it on his own cross-examination, it is difficult to pass it off so lightly as "not intentional". It should be noted that this is still another Eastern District Strike Force case involving lack of prosecution candor, cf. *United States v. Mele*, 462 F. 2d 918 (CA-2, 1972); *United States v. Lusterino*, 450 F. 2d 572 (CA-2, 1971); *United States v. Mosca*, 475 F. 2d 1052 (CA-2, 1973).

2. The Court of Appeals erred when it sustained the district court in allowing evidence of police protection to be received. We should recall this was an income tax case, not a bookmaking case. It was not a bribery case or a corruption of justice case. The evidence of police

protection was of little or no probative value in resolving the issues posed by the indictment. It really added no evidence as to what gross income came into his hands, nor did it evidence that he was in the policy business as opposed to any other illicit endeavor. It served only to prejudice the jury that the defendant was a bad man, deserving of conviction on whatever charge the government sought to bring against him. As such the opinion of the Court of Appeals passing off the evidence as relevant (and within the discretion of the district court) was not in line with appropriate standards of due process.

CONCLUSION

It is requested that the petition be granted.

Respectfully submitted,

JEROME LEWIS
Counsel for petitioner
250 Broadway
New York, New York 10007
212-962-6636

On the petition:
H. ELLIOT WALES
90 Park Avenue
New York, New York 10016
212-687-7200

APPENDIX A—OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1059—September Term, 1972.

(Argued July 18, 1973 Decided Sept. 12, 1973.)

Docket No. 73-1592

UNITED STATES OF AMERICA,

Appellee,

v.

PAUL VARIO,

Appellant.

Before:

MOORE and OAKES, *Circuit Judges*;
GURFEIN,* *District Judge.*

Appeal from a judgment of conviction in the United States District Court for the Eastern District of New York, Jacob Mishler, *Chief Judge.* Appellant was tried before a jury and found guilty of conspiring to conduct a gambling and policy operation without informing the Treasury Department of the existence of that operation or of the gross income derived therefrom. Appellant was also convicted of wilfully and knowingly making and subscribing income tax returns for the years 1965 and 1966 which were verified by a written declaration that they were made under the

* Hon. Murray I. Gurfein, United States District Judge for the Southern District of New York, sitting by designation.

penalty of perjury and which appellant did not believe to be true and correct.

Affirmed.

JEROME LEWIS, New York, N. Y. (H. Elliot Wales, New York, N. Y., on the brief), *for Appellant.*

ROBERT E. LINDSAY, Attorney, Tax Division, Department of Justice, Washington, D.C. (Scott P. Crampton, Assistant Attorney General, Meyer Rothwacks and John P. Burke, Attorneys, Tax Division, Liam Coonan, Special Attorney, Department of Justice, Washington, D. C., Robert Morse, United States Attorney for the Eastern District of New York, Brooklyn, N. Y., of counsel), *for Appellee.*

MOORE, *Circuit Judge:*

This is an appeal from a judgment of conviction entered after a trial by jury, Jacob Mishler, *Chief Judge,* presiding. The jury found appellant Paul Vario guilty on all three counts of an indictment charging him with conspiracy[1] to obstruct the Treasury Department's collection of income taxes in violation of 18 U.S.C. §371[2] (Count I) and with

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1 There were two co-conspirators named in the indictment, Henry Younger and Stephen DePasquale. DePasquale died before trial; Younger pleaded guilty to Count II and received a suspended sentence, a $1,000 fine, and two years probation.

2 Conspiracy to commit offense or to defraud the United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined

wilfully and knowingly submitting income tax returns for 1965 and 1966, which he did not believe to be true, in violation of Section 7206(1) of the Internal Revenue Code of 1954 (Counts II and III).[3] Vario was sentenced to consecutive three-year terms on Counts II and III; a five-year sentence was imposed on Count I to be served concurrently with the sentences imposed on Counts II and III. Vario was also fined a total of $20,000.

On this appeal appellant raises four points which he urges require that this Court reverse his conviction. For the reasons discussed below, we affirm the conviction.

At trial the government attempted to prove that Vario had wilfully and knowingly submitted false income tax returns in 1965 and 1966 in that he had failed to disclose the fact that he was engaged in a gambling or "policy" operation which produced gross income for him. This was not a "net worth" case, and the government did not attempt to show that Vario had received specific sums of money, that he had made large bank deposits, or that he lived above his reported income. Rather, through the testimony of government undercover agents and of others who were involved in a policy business, the government sought to establish that Vario was active in such an operation and

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not more than $10,000 or imprisoned not more than five years, or both. * * * *

18 U.S.C. §317.

3 Any person who—

(1) *Declaration Under Penalties of Perjury*—

Wilfully makes and subscribes any return, statement or other document, which contains or is verified by a written declaration that it is made under penalties of perjury, and which he does not believe to be true and correct as to every material matter; * * * shall be guilty of a felony, and upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than three years, or both, * * *.

§7206(1) Internal Revenue Code of 1954.

that it produced income for him which he had failed to report.[4]

The undercover agents and former policy writers testified to extensive contacts with Vario's co-conspirators in connection with a policy business. Their testimony also revealed that they had had some contacts with Vario in connection with their policy business. While the contacts between these witnesses and Vario were not as extensive as those between the witnesses and Vario's co-conspirators, the evidence as a whole was entirely sufficient to support the jury's verdict and is not here challenged.

Vario's first claim of error stems from an attempt by the government to establish an admission by Vario that he had been involved in a policy business during 1965 and 1966 by introducing evidence that Vario had pleaded guilty to a gambling charge for activities which occurred during 1965 and 1966. While the proper way to introduce evidence of a prior conviction is to produce the judgment of conviction signed by the sentencing judge or a transcript of the relevant proceedings before the court (*See* Rule 803(22), Proposed Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 303, 318-19; *United States ex rel. Lasky* v. *LaVallee,* 472 F.2d 960, 964 (2d Cir. 1973)), the government offered only a copy of the clerk's docket entries. The docket entries were received in evidence with the court stating that the government should also produce a "certified or exemplified copy of the judgment of conviction * * *." (Transcript at 402). No such copy of the judgment of conviction was produced by the government.

The docket entries indicated that in 1966 Vario had pleaded guilty in state court to three counts of contempt of court (for failing to testify before a grand jury) and

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4 For 1965 and 1966, Vario reported income of $7,280, his salary as president of Fountainbleu Florists.

one count of conspiracy to violate the New York bookmaking law. Vario argues that once the court indicated that it would admit the docket entries as an admission that he had been involved in gambling during 1965 and 1966, he had no choice but to waive his Fifth Amendment right to silence and to testify that he had entered a plea of guilty pursuant to an agreement between his attorney and the district attorney's office whereby he would serve only seven months in jail on all four matters. Vario also testified that it was one of the conditions of his agreement to plead guilty to all four charges against him. Vario said that while he was guilty of the contempt of court charges, he was innocent of the bookmaking charge and had pleaded guilty to it only because that was part of the agreement his attorney had arranged.

In addition to being forced to waive his Fifth Amendment privilege, Vario argues that in explaining his plea of guilty to the bookmaking charge, he had to inform the jury that he was guilty of contempt of court for refusing to testify before a grand jury. This admission, says Vario, did not add to his credibility in the eyes of the jury.

The government's position is that by actually taking the stand and admitting the accuracy of the docket entries, Vario waived any objection to the admission of that exhibit. Furthermore, the government asserts that Vario's attorney indicated on two occasions that Vario would testify on his own behalf and that on neither occasion was there a hint that this testimony was "forced" by the introduction of the docket entries regarding the state court guilty pleas. During a discussion of whether the government was going to produce a certified copy of the judgment of conviction, Vario's attorney interjected: "I think it is going to be moot because the defendant is going to take the stand ***." (Transcript at 435). During a discussion of the jury charge concerning the right of a defendant not

to testify, Vario's attorney stated: "If a man does not fight for himself, he is very rarely acquitted." (Transcript at 620).

While this Court certainly does not approve the government's attempt to establish a guilty plea by docket entries without any explanation as to why a certified copy of the judgment of conviction or of the transcript of the proceedings was not produced, we agree that in this case by testifying in his own defense and admitting the accuracy of the docket entries, Vario waived his objection to them.

As his next assignment of error Vario claims that the district court improperly commented upon his attorney's closing argument. In that argument defense counsel had reverted to the "Golden Rule" standard for jury determination—a standard long since rejected by this Court. Specifically, counsel in effect asked the jurors whether if any of them, their friends, or members of their families ran afoul of the law, they would not wish the jury to apply the Golden Rule. Counsel actually told the jury that "the juror's creed is an exemplification of what we call the Golden Rule." (Transcript at 663). Since this is not an applicable standard, the trial judge quite properly advised the jury that "You must be impartial and objective. No one is to judge themselves, that is not the system of justice." (Transcript at 811). *See United States* v. *Birnbaum*, 373 F.2d 250, 258 (2d Cir.), *cert. denied*, 389 U.S. 837 (1967).

Appellant next argues that the district court erred in refusing to strike the testimony of rebuttal witness Detective Robert Donohue. As part of the government's case-in-chief, Detective Frank Fortuna testified that in August, 1965, he had investigated a burglary at Vario's home. While there Fortuna stated that Vario had shown him a small metal box containing three stacks of money which

Vario stated amounted to $15,000. During his testimony Vario denied that he had ever had $15,000 in his house, that he had ever kept money in a metal box, or that he had told Fortuna that there was $15,000 in the box. Vario also denied showing any other police officer a metal box containing currency at the time of that burglary. On rebuttal Robert Donohue was called to testify that he, too, had investigated the August, 1965, burglary of Vario's home and had seen a metal box containing three stacks of currency.

Vario himself then pointed out to his attorney that, despite the existence of an order excluding witnesses from the courtroom, Donohue had been in court on the previous day during Fortuna's testimony. Vario's attorney moved to strike Donohue's testimony, which motion was denied.

When called upon by the court for an explanation of this violation of the court's exclusion order, the government stated that Donohue had attended the trial previously only because his partner, Detective Fortuna, was expected to testify. The government further stated that at the time of Fortuna's testimony, it was not expected that Donohue would testify, and that Donohue's testimony was necessitated only by Vario's denial.

Violation of an order excluding witnesses does not automatically bar a witness from testifying. *Holden* v. *United States*, 150 U.S. 91, 92 (1893). In this case, the trial court was convinced that there was no intentional violation of his order. (Transcript at 609). The court ruled that the testimony should not be stricken only after specifically requesting of Vario's attorney a showing of the prejudice Vario had suffered as a result of this violation of the exclusion order. No such showing was made, nor could there have been such a showing.

The fact that Donohue had been in court to hear Fortuna's testimony was called to the jury's attention. This

case is unlike *United States* v. *Nazzaro*, 472 F.2d 302 (2d Cir. 1973) in which this Court found error where the district court failed to exclude an agent whose "credibility was a crucial element in the government's case • • • ." (472 F.2d at 313 n.12). While Donohue's testimony was helpful to the government in attacking Vario's credibility and in establishing that Vario had gross income which he was concealing, it cannot be said that either Donohue's testimony or his credibility was "crucial" to the government's case. The trial court did not err in refusing to strike Donohue's testimony.

Appellant's final assignment of error is that the district court erred in permitting the government to introduce evidence that tended to show that Vario was receiving police protection. This evidence consisted of the testimony of a Special Agent of the Internal Revenue Service who had conducted surveillance of certain activities in which Vario was involved. The Agent stated that during 1965 he had observed Vario and co-conspirator DePasquale standing outside a house looking up and down the street. Shortly thereafter, a police car drove slowly by. Vario and DePasquale entered a vehicle and drove to an intersection where the same police car came up behind the vehicle in which Vario and DePasquale were riding. The cars then drove off together. Taken as a whole, it was for the jury to decide whether the Agent's testimony would support an inference that Vario and DePasquale were receiving police protection.

Vario's attorney objected to the admission of this testimony at trial and here argues that this evidence had no probative value but served only to indicate that Vario "was a bad man, deserving of conviction on whatever charge the government sought to bring against him. [citation omitted] It really added little as to what gross income

[came] into his hands. Nor did it evidence that he was in the policy business as opposed to any other illicit endeavor." (Appellant's Brief at 16-17).

The rule in this Circuit regarding the introduction of another crime (here, by inference, bribing policemen) is that such evidence is admissible only if it is substantially relevant to some other purpose than to prove criminal character. *United States* v. *Bozza*, 365 F.2d 206, 213 (2d Cir. 1966); *United States* v. *Keilly*, 445 F.2d 1285, 1288 (2d Cir. 1971), *cert. denied*, 406 U.S. 962 (1972).

In this case evidence tending to show inferentially that Vario had paid for police protection was properly admissible to show (1) that Vario's activities generated sufficient income to enable him to pay for such protection, which, another agent testified, would have cost between $900 and $1,000 per month; (2) that Vario had a source of income which he was concealing; and (3) that there was a relationship between Vario and his alleged co-conspirator DePasquale. *United States* v. *Bonanno*, 467 F.2d 14, 17 (9th Cir. 1972), *cert. denied*, 41 U.S.L.W. 3409 (U.S. Jan. 22, 1973); *Hanger* v. *United States*, 398 F.2d 91, 102 (8th Cir. 1968), *cert. denied*, 393 U.S. 1119, *reh. denied*, 395 U.S. 971 (1969). The admission of this type of evidence must of necessity be dependent to a great extent upon the trial judge's discretion. Such evidence would naturally be prejudicial to a defendant. On the other hand, if it is related in a reasonable way to the particular crime charged, the trial judge must weigh the effect of possible prejudice against relevancy. We cannot say that the trial judge here misread the scales. *See* 1 Wigmore, Evidence §29a (3rd ed. 1940).

Judgment affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

PAUL VARIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-590

PAUL VARIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that certain evidence was erroneously admitted against him in this tax evasion prosecution and that the testimony of a rebuttal witness should have been stricken.

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to defraud the United States by impeding the lawful functions of the United States Treasury Department, in violation of 18 U.S.C. 371, and on two counts of wilful filing of false income tax returns for the years 1965 and 1966, in violation of Section 7206(1) of the Internal Revenue Code of 1954 (Pet. App. 2a-3a). Petitioner was sentenced to a total of six years' imprisonment, with possibility of early parole under 18 U.S.C. 4208(a)(7), and fines were imposed totalling $20,000 (Pet. App. 3a). The court of appeals affirmed (Pet. App. 1a-9a).

Petitioner does not challenge the sufficiency of the evidence.[1] It established that the only income reported on his 1965 and 1966 income tax returns was $7,280 in wages each year from Fountainbleu Florists, of which petitioner was president (Tr. 392, 414, 416, 422-423).[2] The evidence also established, through the testimony of an Internal Revenue Service undercover agent and two former "policy" writers, that petitioner was conducting a substantial gambling operation during those years.[3]

1. Petitioner contends that evidence that he was receiving police protection should not have been admitted. The government's evidence concerning police protection was introduced through the testimony of Special Agent Apostolou of the Internal Revenue Service. He stated that, about once a week during the approximately four months that he had petitioner under surveillance, he observed petitioner and one of his co-conspirators emerge from a house which petitioner visited every day and stand on the front lawn for approximately one

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[1] Contrary to petitioner's argument that the court of appeals characterized the evidence against him to be thin (though sufficient) (Pet. 3), the court in fact stated that, "[w]hile the contacts between these witnesses and Vario were not as extensive as those between the witnesses and Vario's co-conspirators, the evidence as a whole was entirely sufficient to support the jury's verdict and is not here challenged" (Pet. App. 4a).

[2] "Tr." references are to the transcript of trial proceedings.

[3] The undercover agent testified that he made four "lay-off" payments of approximately $140 each in December 1965 (Tr. 48-49, 56-58), and twenty-one "lay-off" payments in January 1966 (Tr. 58-59). One of the former policy writers testified that he laid off bets to petitioner's policy operation in 1965 and 1966. During approximately five weeks in 1966, he laid off about $400 per week (Tr. 125-129, 142). The other policy writer testified that he laid off $210 to $280 per day in 1965 and January of 1966 (Tr. 191-192, 195-198, 209-212).

minute, looking up and down the street (Supp. App. 16, 26).[4] Petitioner's companion carried a brown paper bag. A police car then passed by slowly. A passenger in the police car looked in the direction of the two men. Petitioner and his companion thereupon entered an automobile and drove to a nearby intersection at which the same police car came up behind the vehicle in which petitioner was riding. The two cars then drove off together, with the passenger in the police car looking out its rear window (Supp. App. 26-28).

The decision below correctly recognized (Pet. App. 9a) that this evidence established that petitioner's activities generated sufficient income to enable him to pay the police to provide him with escort protection. It also established the relationship between petitioner and his co-conspirator. While the evidence indicated that petitioner was engaged in bribing policemen, it was also plainly relevant, and hence admissible, with respect to the offenses for which petitioner was charged, *viz.*, failure to report gross income from a "policy" operation and conspiracy to conceal both the existence of the operation and his receipt of gross income from it. *United States* v. *Keilly*, 445 F. 2d 1285, 1288 (C.A. 2), certiorari denied, 406 U.S. 962; *United States* v. *Bozza*, 365 F. 2d 206, 213 (C.A. 2).

2. Petitioner's claim with respect to the district court's failure to strike the testimony of a government rebuttal witness who had been present in the courtroom despite an order excluding witnesses is similarly without merit.

During the presentation of the government's case-in-chief, Fortuna, a Nassau County policeman, testified

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[4] "Supp. App." refers to the Supplemental Appendix in the court of appeals.

that on August 7, 1965, he was assigned to investigate a burglary at petitioner's residence (Supp. App. 44-46). Fortuna testified that during the investigation petitioner showed him a metal box which was on the floor of a closet in the master bedroom. The box contained three packages of currency (one package had a $1,000 bill on top), and petitioner stated to Fortuna that there was $15,000 in the box (Supp. App. 48-49). Petitioner completely denied Fortuna's testimony (Tr. 465-466; Supp. App. 73-75). The rebuttal witness, Donohue, the Nassau County policeman who had initially responded to the burglary call at petitioner's residence, corroborated Fortuna's testimony (Supp. App. 103-108). On cross-examination, however, Donohue admitted that he had been in the courtroom during Fortuna's testimony, despite a witness exclusion order of the district court. The district court nevertheless denied a motion to strike Donohue's testimony because the government explained that Donohue had not been expected to be used as a witness and that his testimony became necessary only on account of petitioner's denial of Fortuna's testimony (Supp. App. 111-112).

Contrary to petitioner's argument (Pet. 8-9), the district court's refusal to strike Donohue's testimony does not conflict with *Holder* v. *United States,* 150 U.S. 91. There, the Court explicitly recognized that violation of a rule excluding witnesses does not automatically bar the witness from testifying and that the weight of authority was that the witness could not be excluded on that ground alone. The Court noted that the action of a trial court in admitting testimony under such circumstances will not ordinarily be open to revision (150 U.S. at 92). Here, as the court of appeals observed (Pet. App. 7a), the violation of the rule was not intentional, the fact of the violation was made known to the

jury, and the credibility of Donohue was not a crucial element of the government's case. Cf. *United States* v. *Nazzaro*, 472 F. 2d 302, 313, n. 12 (C.A. 2). Under these circumstances, the motion to strike was properly denied.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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